

ESTATE OF HANK CLUETTE

IBIA 77-11

Decided April 1, 1977

Appeal from an order denying petition for rehearing.

Affirmed and dismissed.

1. Indian Probate: Wills: Testamentary Capacity:
Generally

Testator's reference to unrelated sole devisee as his "nephew" in his last will and testament is possible evidence bearing on the mental capacity of testator, but such reference is not in itself dispositive of the issue of alleged testamentary incapacity. From a consideration of all the evidence, we hold that testator's reference to devisee as his "nephew" in his will does not show that decedent was unable to recognize the natural objects of his bounty or that he was otherwise in an irrational state when the will was executed.

2. Indian Probate: Evidence: Newly Discovered Evidence

Newly discovered evidence may be presented in support of the petition for rehearing but the Board is not required to consider it on appeal.

3. Indian Probate: Wills: Approval of Will

Where the scrivener was not in the reasonable vicinity of the place of hearing,

departmental procedures do not require that he be produced in a will contest where testamentary capacity is proved by other evidence.

4. Indian Probate: State Law: Applicability to Indian Probate, Testate

The Secretary of the Interior is not bound by state law in passing on the validity of wills of Indians disposing of trust property except where otherwise provided by Congress.

APPEARANCES: Charles M. Kilpatrick for appellant, Leona Cluette Dick.

OPINION BY ADMINISTRATIVE JUDGE HORTON

This is an appeal from an order denying petition for rehearing entered September 7, 1976, by Administrative Law Judge William E. Hammett. Appellant is Leona Cluette Dick who would have inherited one-third of the estate of Hank Cluette, deceased unallotted Paiute, had decedent died intestate. She is a niece of the decedent.

Hank Cluette died on September 27, 1973, at the age of 81 years. A probate hearing was conducted on March 24, 1976, at Stewart, Nevada, at which time evidence was received concerning decedent's last will and testament dated July 11, 1972. Appellant, through counsel, objected to approval of decedent's will on the basis that Hank Cluette lacked testamentary capacity to make the will.

By order dated June 30, 1976, Administrative Law Judge Hammett approved decedent's will which devised all of his trust property to Foster Murphy, appellee herein.

Appellant states on appeal that Judge Hammett erred in giving effect to decedent's will when on its face the document reflects that testator was not possessed of sound mind. Specifically, appellant contends that decedent's reference to Foster Murphy in the devise to him as his "nephew" shows that Hank Cluette was unable to perceive the "natural objects of his bounty." (Appellant's brief, p. 5.) It was established that Foster Murphy is not related to the testator but that he was his long-time friend.

[1] We regard testator's reference to Foster Murphy as a "nephew" to be possible evidence bearing on the mental capacity of Hank Cluette at the time his will was made. We do not, however, consider this designation to be dispositive of the issue of alleged testamentary incapacity. See Estate of Anthony Bitseedy, 5 IBIA 270,

275 (1976), in which a testator's devise to a person cited in the will as his "step-daughter" was upheld although the devisee bore no such relationship to him. In Bitseedy we observed that the testator's denomination of the devisee as his "step-daughter" was consistent with the fatherly attitude he had demonstrated towards her and was, therefore, not evidence of irrationality.

In this case the record shows that Foster Murphy, the sole devisee, knew the decedent since childhood (Tr. 24). Their families lived together on the same ranch (ibid.). The decedent and Foster Murphy were considered "good friends" who hunted, worked and stayed together (Tr. 25). In the final years of his life, the decedent was in poor health and for a time made his home in an old car (Tr. 9). Foster Murphy brought this problem to the attention of neighbors (ibid.), and bought a trailer house for Hank Cluette with his own money (Tr. 28). It was common practice for Hank Cluette to refer to Foster Murphy as a "nephew" to both Mr. Murphy and to the general public (Tr. 8-9, 23-24).

In contrast to the above, the record shows through appellant's own witness that Hank Cluette and Leona Cluette Dick were not on good terms and that the decedent refused to live with her (Tr. 38).

From a consideration of all the evidence, we hold that the testator's reference to Foster Murphy as his "nephew" in his last will and testament does not show that the decedent was unable to recognize the natural objects of his bounty or that he was otherwise in an irrational state when the will was executed.

[2] Appellant refers to new evidence not previously obtainable which reveals that Hank Cluette suffered a stroke approximately 10 months prior to the execution of decedent's will. The documents attached to the appeal do not suggest in any way that decedent's mental faculties were affected by this misfortune. In any event, newly discovered evidence may be presented in support of the petition for rehearing but the Board is not required to consider it on appeal. Estate of Harold Humpy, 5 IBIA 132 (1976).

[3] Judge Hammett based his finding of testamentary capacity on the testimony of two adult witnesses to the will who clearly recalled the circumstances of the will's execution. The scrivener was not in the reasonable vicinity of the place of hearing and it was therefore not required that he be produced. 43 CFR 4.233(c).

Appellant's third contention is that the administrative law judge erred in failing to apply a presumption of undue influence. We find that the evidence does not support such a presumption.

[4] Appellant states that it was legal error not to apply the law of California to the resolution of this probate. No specific state laws are cited however. It is well settled by federal courts and departmental interpretation that the Secretary of the Interior is not bound by state law in passing on the validity of wills of Indians disposing of trust property except where otherwise provided by Congress. Hansen v. Hoffman, 113 F.2d 780 (10th Cir. 1940); Estate of William Cecil Robedeaux, 1 IBIA 106, 78 I.D. 234; Estate of Anthony Bitseedy, *supra*. The passage from the Act of February 8, 1887, 24 Stat. 389 (25 U.S.C. § 348), cited at page 3 of appellant's brief refers to the applicability of state law after fee patents have been executed. The other provisions of Section 348, as they relate to laws governing inheritance of trust land, have been construed as pertaining to cases of intestate succession only. Further, although California acquired certain civil jurisdiction responsibilities over Indian country by virtue of the Act of August 15, 1953, 67 Stat. 588-90, commonly referred to as P.L. 280, the Act specifically provides with respect to Indian property held in trust by the United States that nothing therein shall be construed as conferring "jurisdiction upon the State to adjudicate, in probate proceedings * * * the ownership or right to possession of such property or any interest therein." 25 U.S.C. § 1360(b). The Act also denied to California the authority to regulate trust property (such as through a probate code of state-wide application) "in a manner inconsistent with any Federal * * * statute or with any regulation made pursuant thereto" (*ibid.*). Thus, the requirements of 25 U.S.C. § 373 and our departmental regulations promulgated in response thereto (43 CFR 4.200 *et seq.*) remain controlling in this case. See Santa Rosa Band of Indians v. Kings County, 532 F.2d 655 (9th Cir. 1975).

NOW, THEREFORE, by virtue of the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, IT IS ORDERED that the September 7, 1976 Order Denying Petition for Rehearing entered by Administrative Law Judge William E. Hammett be, and the same is, hereby AFFIRMED and the appeal of Leona Cluette Dick from said order is hereby DISMISSED.

IT IS HEREBY FURTHER ORDERED that at the expiration of 60 days from the date of this decision, the Superintendent of the Central California Agency of the Bureau of Indian Affairs undertake to distribute decedent's trust estate in accordance with the terms of his July 11, 1972 last will and testament as follows: all to Foster Murphy.

This decision is final for the Department.

Done at Arlington, Virginia.

Wm. Philip Horton
Administrative Judge

I concur:

Alexander H. Wilson
Chief Administrative Judge

Mitchell J. Sabagh
Administrative Judge